of conduct prejudicial to the business; or (*b*) otherwise conducts himself so that it is not reasonably practicable for the others to carry on the business with him.[8] In these latter instances, obviously, dissolution at the instance of the partner in default would be inequitable. But, it is submitted by all the analogies and equities applicable to dissolution in cases of mental incapacity,[10] there is no basic principle for refusing like relief at the instance of one in contractual default through unavoidable physical incapacity, as in the principal case.

That valid dissolution in cases of complete incapacity of any nature may be had in no way other than by decree in equity has never been doubted in England since Lord Kenyon's ruling in *Sayer* v. *Bennett.*[11] Parsons, in his work on Partnership,[12] while recognizing the existence of the English rule, strongly advocated that "insanity, certain, complete and hopeless of itself and at once dissolves the partnership." But he is supported by only two cases,[13] apparently briefly considered; the more prevalent ruling being in accord with that of the English courts.[14]

*J. C. A.*

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SPECIFIC PERFORMANCE—STATUTE OF FRAUDS—Whether mistake is a ground for depriving the defendant of the protection of the Statute of Frauds in a bill for specific performance is a much vexed question, and one on which there is more conflict than harmony of opinion. In *Wirtz* v. *Guthrie,*[1] the defense to a bill for specific performance of an agreement for the sale of land, was that the gross rent of the premises was not what the defendant had been lead to believe. The plaintiff then offered to prove by oral testi-

[8] Lindley: Partnership, 640, 655-658.

[10] The insane partner has the right to come into equity by committee to have the partnership dissolved upon the grounds, (*a*) of complete incapacity to perform his agreement, Jones v. Noy, *supra,* n. 3; and (*b*) as ruled in Jones v. Lloyd, *supra,* n. 7, "By the act of God that bargain (contract of copartnership) has become incapable of performance, and he is not able to exercise that supervision over the conduct of the business and care of the property" . . . necessary to protect his interest.

It is suggested that these reasons apply with equal force to cases of complete incapacity through physical disability. Furthermore the objection that the physically incapacitated partner remains *sui juris,* as contrasted with one mentally incapacitated, and therefore has means to protect himself at law, is of no great weight and is not insurmountable in equity, when it is observed that a lunatic also may sue at law by committee and has, nevertheless, relief in chancery.

[11] 1 Cox 107 (Eng. 1784).

[12] Parsons: Partnership (1st ed.), 465.

[13] Davis v. Lane, 10 R. H. 156, 161 (1839); Isler v. Baker, 6 Humph. 85 (Tenn. 1845).

[14] Raymond v. Vaughn, *supra,* n. 3; Casky v. Casky, *supra,* n. 2; Story (7th ed.), §§296-298; Henn v. Walsh, 2 Edw. Ch. 129 (N. Y. 1833).

[1] 87 Atl. Rep. 134 (N. J. 1913).

mony that one lot had been omitted by mistake from the agreement and asked that the contract be reformed to include this lot and then enforced. To this the defendant set up the Statute of Frauds. The court held that though in the case of an executed contract the party who had received the benefit of the mistake would be prevented in equity from holding it; yet in mere executory agreements which do not disturb the legal title, the statute would not be broken in upon.

The English Chancery Courts lay down the doctrine that, irrespective of the Statute, the plaintiff may not introduce parol evidence for the purpose of reforming the written contract and then have it enforced.[2] In this country a more lenient rule prevails and a great number of courts have granted reformation and enforcement.[3] In support of this doctrine Chancellor Kent said:[4] "Why should not the party aggrieved by mistake have relief as well when he is plaintiff as well as when he is defendant? It cannot make any difference in the reasonableness and justice of the remedy, whether the mistake were to prejudice one party or the other." But in the American jurisdictions, where the statute requires the contract to be in writing, a distinct conflict exists. In these contracts all possible errors requiring verbal variation may be reduced to two general groups: (*a*) by means of the error the contract may include certain subject matter which was not intended by the parties to come within its operation; (*b*) the contract may omit, through error, certain subject matter which was intended to come within its operation.

A reformation and enforcement based upon parol evidence in the first groups of cases does not conflict with the statute, since the court does not make a parol contract but simply narrows the operation of one already made. In the second group, it is asserted that by reformation the contract is made to include subject matter not in the original agreement, and the court has virtually made a new contract and enforced it in direct conflict with the statute.[5] The courts adopting this view, limit their relief to cases in the first group. By carrying this doctrine to its logical conclusion it would seem that equity must always make way for the statute, thereby preventing the establishment and enforcement of parol contracts which the defendant's actual fraud had prevented from being reduced to writing. Other courts, however, make no distinction between the two groups and grant relief in both.[6] The latter view is favored by Pomeroy, who

[2] Townshend v. Stangroom, 6 Ves. Jun. 728 (1801). Woolham v. Hearn, 7 Ves. Jun. 211 (1802).

[3] Keisselbrack v. Livingston, 4 Johns. Ch. 144 (N. Y. 1819). Gillespie v. Moon, 2 Johns. Ch. 585 (N. Y. 1817). Smith v. Allen, 1 N. J. Eq. 43 (1830). Hendrickson v. Ivins, 1 N. J. Eq. 562 (1832).

[4] Keisselbrack v. Livingston, *supra*, n. 3.

[5] Glass v. Hurlbert, 102 Mass. 24 (1869). Elder v. Elder, 10 Me. 80 (1833).

[6] Note 3, *supra*.

claims it is supported by the great weight of authority.[7] And in following it out he argues that if the rule applies to deeds which have actually conveyed title, then *a fortiori* it may be applied to mere executory contracts. But the cases to which he refers seem to be those of executed agreements. Moreover there are both decisions[8] and statements by writers,[9] that no court has ever reformed an executory contract on parol evidence and specifically enforced it with the variations.

It is interesting to note the *dictum* of Lord Hardwicke to the effect that the plaintiff in a bill for specific performance might have been allowed the benefit of disclosing a mistake to the court, "because it was an executory agreement only."[10]

*T. S. P.*

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TRADE-NAMES—UNFAIR COMPETITION—In *Briggs Co.* v. *National Wafer Co.*,[1] the court applies the rule that the user of a trade-name which has acquired a secondary meaning, is entitled to injunctive protection against the piracy of that name by competitors; but the protection granted will be only co-extensive with the area in which that secondary meaning has been recognized by the ultimate purchasers of the class of goods in question. This is the logical result of the present development of the law of unfair competition. There can be no unfair trade unless there be competition.[2] The gist of the action is passing off the goods of one manufacturer or dealer as the goods of another, *i. e.*, of trading upon the reputation of a competitor.[3]

Although it is agreed that a trade-mark is a species of property,[4] it is by no means settled whether a trade-name is likewise to be regarded as property.[5] A trade-name which is geographical,

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[7] Pom. Eq. Juris., §866.

[8] Macomber v. Peckham, 16 R. I. 485 (1889). Safe Deposit Co. v. Diamond C. & C. Co., 83 Atl. Rep. 54 (Pa. 1912).

[9] Adams Eq. (5th Am. ed.) 171.

[10] Joynes v. Statham, 3 Atk. 388 (Eng. 1746).

[1] 102 N. E. Rep. 87 (Mass. 1913). As to contemporaneous use of trademarks in different localities, see 58 Univ. of Pa. Law Rev. 115 (1909).

[2] Sartor v. Schaden, 125 Iowa, 696 (1904); Eastern Outfitting Co. v. Manheim, 59 Wash. 428 (1910).

[3] Ford v. Foster, L. R. 7 Ch. 611, 623 (1872); Singer Mfgers. v. Wilson, 3 A. C. 376 (1877); Glove Co. v. Rubber Co., 128 U. S. 598 (1888); N. E. Awl & N. Co. v. Needle Co., 168 Mass. 154, 155 (1897); Regis v. Jaynes, 185 Mass. 458, 462 (1904); Fox Co. v. Glynn, 191 Mass. 344, 349 (1906); Reading Stove Works v. Howes, 201 Mass. 437 (1909).

[4] 57 U. of Pa. Law Rev. 251 (1909).

[5] Lord Herschell in Reddaway v. Banham (1896), A. C. 199, 209, and Holmes, J., in Chadwick v. Cowell, 151 Mass. 190, 194 (1890), refuse to recognize any right of property in a trade-name; *contra*, Lord Westbury in Wotherspoon v. Currie, L. R. 5 H. L. 508 (1872); Munger, J., in Wolf Bros. v. Hamilton-Brown Shoe Co., 165 Fed. 413 (1908); Day, J., in Am. Wash-